(5)

Supreme Court, U.S.
FILED
NOV 7
CLERK

No. 02-541

In the
Supreme Court of the United States

NASSAU COUNTY, ET AL.,
Petitioners,

v.

RAY E. SHAIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT L. HERBST
Counsel of Record
SPENCER B. FREEDMAN
BELDOCK, LEVINE AND
HOFFMAN, LLP
99 PARK AVENUE
NEW YORK, NY 10016
(212) 490-0400

Counsel for Respondent
Ray E. Shain

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

20 pp

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Respondent, Ray E. Shain, states that he has no corporate affiliations.

TABLE OF CONTENTS

Corporate Disclosure Statement i

Table of Contents ii

Table of Authorities iii

Counterstatement of the Case 1

Reasons for Denying the Writ 3

A. There is no Circuit Conflict in the Strip Search Context 3

B. There is no Conflict between *Turner* and *Bell* and its Strip Search Circuit Progeny 9

Conclusion 14

TABLE OF AUTHORITIES

CASES

Bell v. Wolfish,
441 U.S. 520 (1979) 3, 4, 8, 9, 10, 11, 12, 13

Block v. Rutherford, 468 U.S. 576 (1984) 9

Chapman v. Nichols,
989 F.2d 393 (10th Cir. 1993) 5, 6, 8, 12

Covino v. Partissi, 967 F.2d 73 (2nd Cir. 1992) 11

Friend v. Kolodzieczak, 923 F.2d 126 (9th Cir. 1990) . . 10

Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984) 8

Hause v. Vaught, 993 F.2d 1079 (4th Cir. 1993),
cert. denied, 510 U.S. 1049 (1994) 11

Hodgers-Durgin v. De La Vina,
199 F.3d 1037 (9th Cir. 1999) 8-9

Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985) 5

Jones v. North Carolina Prisoners' Union,
433 U.S. 119 (1977) 9

Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981),
cert. denied, 455 U.S. 942 (1982) 5, 9

Masters v. Crouch, 872 F.2d 1248 (6th Cir.),
cert denied, 493 U.S. 977 (1989) 5, 12

Mary Beth G. v. City of Chicago,
723 F.2d 1263 (7th Cir. 1983) 5, 6, 8

Mauro v. Arapaio,
188 F.3d 1054 (9th Cir. 1999) (*en banc*),
cert. denied, 529 U.S. 1018 (2000) 11

O'Lone v. Shabazz, 482 U.S. 342 (1987) 10

Pell v. Procunier, 417 U.S. 817 (1974) 9

Roberts v. Rhode Island,
239 F.3d 107 (1st Cir. 2001) 4, 6, 7, 12

Sarnicola v. County of Westchester, 2002 WL 31408882
(S.D.N.Y. October 23, 2002) 4

Schmerber v. California, 384 U.S. 757 (1966) 5

Security and Law Enforcement Employees v. Carey,
737 F.2d 187 (2nd Cir. 1984) 5

Siddiqi v. Leak, 880 F.2d 904 (7th Cir. 1989) 10

Stewart v. Lubbock County, 767 F.2d 153 (5th Cir. 1985),
cert. denied, 475 U.S. 1066 (1986) 5

Thompson v. City of Los Angeles,
885 F.2d 1439 (9th Cir. 1989) 12

Thornburgh v. Abbott, 490 U.S. 401 (1989) 10

Turner v. Safley,
482 U.S. 78 (1987) 4, 9, 10, 11, 12, 13

Varrone v. Bilotti, 123 F.3d 75 (2d Cir. 1997) 5

Ward v. County of San Diego,
791 F.2d 1329 (9th Cir. 1986),
cert. denied, 483 U.S. 1020 (1987) 5, 11

Weber v. Dell, 804 F.2d 796 (2nd Cir. 1986),
cert. denied sub nom County of Monroe v. Weber,
483 U.S. 1020 (1987) 4, 6, 9, 10, 11, 13

Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001) . 4, 5, 12

CONSTITUTIONAL PROVISIONS

U.S. Constitution First Amendment 10, 11

U.S. Constitution Fourth Amendment
. . . . . 3, 5, 6, 10, 11, 12, 13

COUNTERSTATEMENT OF THE CASE

The salient facts are set forth in the Second Circuit's opinion below. (A. 11-30).[1]

On July 30, 1995, Shain, a practicing attorney, was admitted to the Nassau County Correctional Center ["NCCC" or "Jail"] and strip searched pursuant to a blanket policy that required any person admitted to the Jail to be subjected to a strip search and visual body cavity inspection as a matter of course. (R. 595). Shain was required to strip naked. (R. 596-99). Corrections Officer Dantunono looked in Shain's ears, his mouth, his hair, and his underarms, and then made him turn around, bend over and spread his buttocks apart with his hands to facilitate a visual inspection of his rectum. (R. 596-99; 761). The strip search procedure also included an inspection of Shain's frontal genitalia - the penis, the scrotum, and the testicles - which he was required to lift up. (R. 764; 792-93).

Shain's strip search was performed in a large room, without privacy, in the sight of other corrections officers and prisoners. (R. 608). Shain was to be held at the Jail overnight only, to be produced in Family Court the next morning. Prior to leaving the Jail, Shain was subjected to another strip search and visual body cavity inspection. Because the NCCC's health quarantine policy required new admittees to be isolated from the general jail population for 72 hours after admission, Shain was never admitted to the

---

[1] "A." is a reference to the Appendix annexed to the Petition for a Writ of Certiorari. "R." is a reference to the record citation in the Appendix filed in the Second Circuit.

general jail population. Upon his appearance in Family Court, he was released from custody.

At the time he was strip-searched, no grounds existed to suspect that Shain was concealing weapons or contraband, let alone concealing them under his garments. After reviewing Shain's jail file, Lt. Considine acknowledged that there was no "particularized suspicion that Mr. Shain had contraband on him." (R. 806). Petitioners knew only that Shain was a civil detainee being held overnight, to be produced in Family Court the following morning. The verbal harassment family offense for which he had been arrested and detained was not a crime of violence or one involving drugs, weapons or other contraband. (R. 102-03). Shain had never previously been arrested. When he was arrested here, his pockets were emptied and a small combination pocketknife (also containing a bottle opener and screwdriver) was removed and left at his house. (R. 542 ¶ 5, 585). The pocketknife, however, was not considered to be a weapon, and its presence was neither recorded in police paperwork nor communicated to Jail officials. (R. 103). Shain did not physically resist arrest. (R. 583-85).

From the point of his arrest until his arrival at the Jail where he was strip-searched, Shain was never out of the custody of law enforcement officers, even at the hospital to which he had been transported for evaluation and treatment of back spasms. Although Shain was in a holding cell with other arrestees for some time before his court appearance, correctional procedure at the courthouse insured that Shain and his cellmates were all thoroughly patted down and searched prior to entry into the cell. Indeed, for almost all of the 27 hours he was in custody prior to being strip searched, Shain was in handcuffs in a cell at the precinct, the hospital or the courthouse. He had no contact visits with anyone.

In short, the strip and body cavity search to which Shain was subjected was entirely unsupported by reasonable suspicion.

REASONS FOR DENYING THE WRIT

Two reasons for denying the writ stand out among many: First, in cases concerning blanket policies mandating strip searches of all non-felony arrestees upon admission to Jail facilities, there is no conflict among the circuits. Every circuit court to have considered the matter has ruled such blanket policies unconstitutional, requiring reasonable suspicion to support such strip searches. Significantly, petitioners do not cite any strip search cases to support their suggestion of a conflict among the Circuits.

Second, in the 16 years since the Second Circuit first held that strip searches of persons arrested on misdemeanor and petty offense charges must be justified by particularized reasonable suspicion of concealed weapons or contraband, petitioners and other jail administrators have failed to demonstrate to any federal appellate court that blanket strip searches of all admittees are necessary to provide security at their institutions, particularly today, when magnetometers, B.O.S.S. chairs, and other less intrusive means are easily available. The record in the case at bar is no exception, for it demonstrates how non-essential strip searching has been in providing security at the NCCC.

A. There is no Circuit Conflict in the Strip Search Context

The Fourth Amendment prohibits "unreasonable" searches and seizures. In *Bell v. Wolfish,* 441 U.S. 520 (1979), this Court ruled that Fourth Amendment

reasonableness analysis "requires a balancing of the need for a particular search against the invasion of personal rights that the search entails." Reasonableness turns on (1) the scope of the particular intrusion, (2) the manner in which the search is conducted, (3) the justification for initiating the search and (4) the place in which the search is conducted. 441 U.S. at 559.

In 1986, the Second Circuit applied *Bell* to hold that a strip search of a misdemeanor arrestee is unlawful unless there is "reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." *Weber v. Dell,* 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied sub nom County of Monroe v. Weber,* 483 U.S. 1020 (1987). As the Second Circuit noted below, "[w]e also rejected defendant's request for qualified immunity [in *Weber*] because all the circuits that had addressed similar policies had found them to be unconstitutional and because we long had stressed the intrusive nature of body cavity searches. *See* 804 F.2d at 803." (A. 18).

Sixteen years later, and 15 years after *Turner v. Safley,* 482 U.S. 78 (1987), on which petitioners so heavily rely here, that same observation remains true. "For more than two decades, courts have specifically and repeatedly recognized the importance of guarding against unreasonable strip searches, in view of the degrading nature of this particular invasion of privacy." *Sarnicola v. County of Westchester,* 2002 WL 31408882, *9 (S.D.N.Y. October 23, 2002). The Second Circuit's decision below is simply one in a long and unanimous line of cases that, relying on *Bell*, have struck down blanket strip search policies like that here, both before and after *Turner*. *See, e.g., Wilson v. Jones,* 251 F.3d 1340 (11th Cir. 2001); *Roberts v. Rhode Island,* 239 F.3d 107

(1st Cir. 2001); *Chapman v. Nichols,* 989 F.2d 393 (10th Cir. 1993); *Masters v. Crouch,* 872 F.2d 1248 (6th Cir.), *cert denied,* 493 U.S. 977 (1989); *Ward v. County of San Diego,* 791 F.2d 1329 (9th Cir. 1986), *cert. denied,* 483 U.S. 1020 (1987); *Jones v. Edwards,* 770 F.2d 739 (8th Cir. 1985); *Stewart v. Lubbock County,* 767 F.2d 153 (5th Cir. 1985), *cert. denied,* 475 U.S. 1066 (1986); *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983); *Logan v. Shealy,* 660 F.2d 1007 (4th Cir. 1981), *cert. denied,* 455 U.S. 942 (1982).

"Every circuit court" which has considered strip searches of plaintiffs arrested for minor violations who were strip searched solely because a blanket policy required such searches of all detainees "has concluded that a search under these circumstances is unconstitutional." *Chapman,* 989 F.2d at 395 (*citations omitted).*[2] "[N]o published state or federal case since *Schmerber v. California,* 384 U.S. 757 (1966) (test of reasonableness under fourth amendment requires a balancing of the need for particular search against the invasion of personal rights the search entails) upholds the constitutionality of a blanket policy of strip searches of minor offense arrestees." *Ward,* 791 F.2d at 1332; *see also Wilson,* 251 F.3d at 1343-44 (citing cases).

This judicial consensus for more than 30 years is based on several fundamental principles. The first and most important is the widely-shared perception that visual body cavity searches are different from other searches. They

---

[2] In related contexts, reasonable suspicion is required before correctional facilities may strip search prison visitors or corrections officers. *See, e.g., Varrone v. Bilotti,* 123 F.3d 75 (2d Cir. 1997) (visitors); *Security and Law Enforcement Employees v. Carey,* 737 F.2d 187 (2d Cir. 1984) (corrections officers).

impinge much more seriously upon Fourth Amendment values because they are a "severe if not gross interference with a person's privacy." *Roberts*, 239 F.3d at 110. They are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G.*, 723 F.2d at 1272. "The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening. Moreover the imposition of such a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event." *Chapman,* 989 F.2d at 396.

Second, those arrested and detained for misdemeanor and violation level offenses are not only less likely to be dangerous but, like those arrested for offenses having nothing to do with physical violence, weapons or drugs, are less likely to be concealing weapons or contraband under their clothing. *Roberts,* 239 F.3d at 111-12. Because of the "essentially unplanned nature of an arrest and subsequent incarceration," it is "far less likely that smuggling of contraband will occur subsequent to an arrest (when the detainee is normally in handcuffed custody) than during a contact visit that may have been arranged solely for the purpose of introducing contraband[.]" *Roberts,* 239 F.3d at 111.

Third, because of technological advances like magnetometers and other devices, corrections officials are now expected to "be able to detect contraband on the person of a detainee without the need for a body cavity inspection." *Roberts,* 239 F.3d at 111. Indeed, in all the years since *Weber,* no prison administrator has been able to demonstrate in any reported case of which Respondent is aware that

blanket strip searching upon admission to a municipal or county jail facility was either necessary or effective in preventing contraband from being introduced to such facilities. *See, e.g., Roberts,* 239 F.3d at 112 ("close examination of [the] record indicates that a body cavity search was (with one possible exception) entirely unnecessary to discover contraband found during search").

The record below also demonstrates how ineffective and unnecessary blanket strip searches and body cavity inspections have been to the maintenance of security at the NCCC. Only one officer per shift strip-searched all new inmates upon their admission to the Jail. In the two years that Corrections Officer Dantunono conducted these strip searches, he never found any weapons or contraband, and he never heard of any weapons or contraband recovered as a result of such strip-searching by any other corrections officers at the Jail. (R. 769; 773-74). Lt. Considine, the supervisor who would receive all reports of weapons or contraband found in a strip search, could not recall one instance in the year before he testified of receiving a report of contraband discovered in a strip search of any person newly-admitted to the Jail. (R. 799-800).

In response to Shain's request for NCCC documentation on strip searches that had turned up weapons or contraband from 1993 to 1998 -- a period during which there were approximately 75,000 strip searches of new admissions (R. 795-96) -- petitioners provided documents on only 16 strip searches conducted on new detainees admitted to the NCCC (R. 343-493; SA7-43).[3] Only three of those searches yielded weapons or contraband from the admittee's

---

[3] "SA" refers to the Supplemental Appendix in the Second Circuit.

body or body cavity, and in those three cases there was a drug or felony history that might have justified a strip search based on reasonable suspicion. (R. 354-72, R 391-97, R. 398-413). In the other 13 searches, the contraband was found in or on the shoes or outer clothing, and could therefore have been found by a "pat down" or "clothing" search only. (R. 343-493). In other words, petitioners could not point to even one case where a strip search performed without colorable reasonable suspicion was required to uncover a weapon or other contraband from a body or body cavity. There was also no overcrowding at the NCCC when Shain was strip searched in 1995, and for many years prior thereto. (R. 724-25).

Thus, this record is utterly devoid of any factual support for petitioners' incendiary assertion that the decision below "undermines the safety of corrections officers and inmates" of this or any other county jail or correctional facility. (Petition, at 2). Nor is there one iota of support for the proposition that "strip searches remain the most effective method for detecting contraband," or "are an indispensable tool for maintaining a secure prison environment." (Petition, at 16).

Accordingly, while the need to assure jail security is "a legitimate and substantial concern," blanket strip search policies bear "an insubstantial relationship to security needs so that, when balanced against" the intrusion of privacy interests that strip searches necessarily entail, such searches of non-felony arrestees and detainees upon admission to jail facilities, conducted without reasonable suspicion, "cannot be considered 'reasonable'" under *Bell's* balancing test. *Chapman*, 989 F.2d at 396, *quoting Mary Beth G.*, 723 F.2d at 1273; *see also Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984), *overruled on other grounds*, *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (jail security needs

do not justify strip search absent reasonable suspicion that individual detainee is carrying weapons or contraband); *Logan,* 660 F.2d at 1013 ("An indiscriminate strip search policy routinely applied to detainees such as Logan along with all other detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations.").

No Circuit has suggested otherwise, either before or after *Turner.* There is thus no Circuit conflict, no reason to disturb these settled principles of law, and no reason to grant the writ.

B. There is no Conflict between *Turner* and *Bell* and its Strip Search Circuit Progeny

Petitioners did not even cite *Turner* in the district court or the Second Circuit. Here, however, they suggest that *Turner* rather than *Bell* applies, requires reversal, and creates a Circuit conflict which requires this Court's intervention.

But *Turner* is not in conflict with *Bell*, nor with *Weber* and the other Circuit Court cases applying *Bell* in the blanket strip search policy context. Rather, *Turner* re-affirmed that *Bell* and three other decisions of this Court[4] do not require prison regulations to meet a heightened scrutiny standard, but only that such regulations be reasonably related to legitimate penological interests that must be balanced against the burden

---

[4] *Block v. Rutherford*, 468 U.S. 576 (1984); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977); *Pell v. Procunier*, 417 U.S. 817 (1974).

placed by such regulations on constitutional rights. 482 U.S. at 86-88.

This Court in *Turner* "identified several factors that are relevant to, and that serve to channel the reasonableness inquiry," *Thornburgh v. Abbott,* 490 U.S. 401, 414 (1989), including whether there is a valid, rational connection between the regulation and a legitimate governmental interest purportedly justifying it, and whether there are readily available alternatives to the regulation and to exercise of the constitutional right involved. 482 U.S. at 89-91. These *Turner* factors have generally been applied in balancing prison regulations against the constitutional rights of convicted prisoners in state prisons rather than of pretrial detainees in municipal and county jails, and in cases involving regulations which impinge upon "affirmative" constitutional rights such as the right *to* free exercise of religion or the right of access to publications under the First Amendment, rather than upon the Fourth Amendment's right to be free *from* unreasonable searches. *See, e.g., Thornburgh* (First Amendment challenge to prison regulation restricting access to publications); *O'Lone v. Shabazz,* 482 U.S. 342 (1987) (First Amendment challenge to prison work regulations which prevented attendance at religious services); *Turner* (First Amendment challenge to ban on inmate-to-inmate correspondence).

The cases cited by petitioners to suggest a Circuit conflict are all First Amendment cases and are therefore distinguishable from the Fourth Amendment strip search context in which *Bell, Weber* and *Shain* constitute links in an unbroken chain of settled strip search jurisprudence. See Petition, at 11-12, citing *Siddiqi v. Leak*, 880 F.2d 904 (7th Cir. 1989) (First Amendment challenge to policy that infringed on Muslim inmates' access to Jumu'ah services); *Friend v. Kolodzieczak*, 923 F.2d 126 (9th Cir. 1990) (First

Amendment challenge to policy prohibiting inmates from possessing rosaries and scapulars in their cells); *Mauro v. Arapaio,* 188 F.3d 1054, 1058-62 (9th Cir. 1999) (*en banc*), *cert. denied,* 529 U.S. 1018 (2000) (First Amendment challenge to policy denying inmates access to sexually explicit publications); and *Hause v. Vaught,* 993 F.2d 1079, 1083 (4th Cir. 1993), *cert. denied,* 510 U.S. 1049 (1994) (First Amendment challenge to policy prohibiting receipt of outside publications by mail; court noted that both *Turner* and *Bell* accorded the same standard of deference to prison administrative policies).

No case in this Court has intimated that *Turner* overruled or undercut either *Bell,* which fashioned a reasonableness balancing test for the specific Fourth Amendment context with which it was concerned, or the unanimous line of Circuit cases discussed above predicated on *Bell* and ruling unconstitutional blanket strip search policies like that here. Indeed, less than one month after *Turner* was decided, this Court denied certiorari on the same day in two such cases, *Weber* and *Ward*, without mentioning *Turner* or suggesting that it overruled or undercut either those cases or *Bell*. Indeed, in the 15 years since *Turner*, virtually all of the strip search cases in the Circuits have relied exclusively on *Bell* and its balancing test and have not even mentioned *Turner*.

In the few cases in which *Turner* has been cited in the strip search context, it has been to reiterate the standard of review set forth in *Bell* and, in some cases, to complement the court's application of the *Bell* balancing test where the court has also found certain *Turner* factors to be useful. *See, e.g., Covino v. Partissi,* 967 F.2d 73, 77-78 (2d Cir. 1992) ("court must balance the intrusiveness of the search on the individual's fourth amendment interests against its promotion

of legitimate governmental interests," citing both *Bell* and *Turner*); *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1445-46 n. 4 (9th Cir. 1989) (standard set forth in *Turner* does not prohibit application of the *Bell* test in the Fourth Amendment context).

These cases only highlight how complementary, rather than inconsistent, the standards and tests articulated in *Turner* are to *Bell* and *Bell's* strip search Circuit progeny. Rather than being in "direct conflict" as petitioners suggest (Petition, at 13-16), all of these cases, including the Circuit cases holding blanket strip search policies unconstitutional, reject application of a heightened standard of review, and "recognize[ ] the judiciary's limited institutional competence in the field of prison administration ... [w]ithout abandoning the judicial duty to safeguard individual rights." (Petition, at 13). All employ a balancing test which, based on similar principles of limited judicial review, balances the burden placed on constitutional rights against security concerns or other legitimate interests of the administrators of prisons and jails. *Bell*'s formulation of the balancing test is simply designed more specifically to take into account the pertinent considerations in Fourth Amendment challenges to strip search policies in correctional facilities and continues to provide the most useful framework in such cases, as is evident by its unanimous employment by appellate courts in this context post-*Turner*. *See, e.g., Wilson v. Jones*, *supra*; *Roberts v. Rhode Island*, *supra*; *Chapman v. Nichols*, *supra*; *Masters v. Crouch*, *supra*.

Finally, application of the specific *Turner* factors would not help petitioners here. Their blanket strip search policy would fail that test as it does the related but more specific *Bell* test. On this record, there is not one shred of evidence that indiscriminate strip searching is either necessary

or even effective in preventing the introduction of weapons or contraband to the facility. Petitioners cannot point to one strip search during all the years they maintained their unlawful blanket policy that actually ferreted out weapons or contraband on an admittee's body or in one of his or her bodily orifices in circumstances where reasonable suspicion was absent. Petitioners have therefore failed to demonstrate a valid, rational connection between their blanket strip search policy and the security interest that they purport to advance to justify it. 482 U.S. at 89-90.

There is also no explanation at all of why readily available alternatives such as magnetometers, B.O.S.S. chairs, careful "pat down" and "clothing" searches would not provide adequate security, particularly when all admittees to Jail are isolated from the general population for the first 72 hours of their admission. The ready availability of such alternatives is evidence under *Turner* that the blanket strip search policy is unreasonable. *Id.* at 90-91.

Moreover here, there are no alternative means of protecting admittees' privacy rights – once they are subjected to a strip and visual body cavity search, they have irrevocably lost their Fourth Amendment rights, and have been subjected to the most degrading and extreme invasion of those rights, which our settled strip search jurisprudence teaches merits protection against unreasonable intrusion. *Id.* at 90.

In short, the outcome would be the same because *Turner* is fundamentally compatible rather than inconsistent with *Bell*, *Weber* and the other Circuit cases which, relying on *Bell,* have consistently held blanket strip search jail policies as applied to non-felony admittees unconstitutional. There is no conflict, either in the caselaw or among the Circuits, and

nothing in this record or the decision of the court below, which warrants this Court's intervention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

ROBERT L. HERBST
Counsel of Record
Beldock, Levine and Hoffman, LLP
99 Park Avenue
New York, New York 10016
(212) 490-0400

SPENCER B. FREEDMAN
of Counsel.

Attorneys for Respondent